Supreme Court, U.S.
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No. 99-308

In The

Supreme Court of the United States

DENÁ NENÁ HENASH a/k/a
TANANA CHIEFS CONFERENCE,

Petitioner,

vs.

CATHERINE N. IPALOOK and
The STATE OF ALASKA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION

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September 30, 1999

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ARGUMENT

1) The Reply Brief Contains A Misstatement of Fact; The Constitutional Issues Were Timely Raised

Ipalook's Opposition Brief incorrectly states that the federal due process question was not timely raised under State law. The representation is clearly in error. The issue was raised on a motion for reconsideration filed in a timely manner. Ipalook moved to strike the constitutional arguments in that motion. The trial court declined that request. Finally, the Alaska Supreme Court ruled on the merits of the issue.

As noted in the Petition, the Trial Court granted Tanana Chiefs leave to file a motion for reconsideration with respect to the issue of punitive/liquidated damages. Petition, at 6. Indeed, the Respondent's Appendix contains a transcript of the proceeding in which the Court stated:

> With respect to the liquidated damages issue, the court will permit you (Tanana Chiefs) to, you know, file a motion to reconsider, and submit briefing on that issue, . . .

Resp. App., at 49. Additionally, Respondent's Appendix also contains a copy of the motion for reconsideration, which relied upon the recent decisions of the U.S. Supreme Court on punitive damages. *See* Resp. App., at 58-60. In Alaska, reconsideration may be sought up to 10 days *after* the date of notice of a ruling. Civ. R. 77(k). In the present case, the motion to reconsider was filed on April 28, 1997 [App. 62; Resp. App. 50], which was *before* the entry of the trial Court's Findings of Facts, entered on June 24, 1997. Tanana Chiefs sought reconsideration after

the Court orally announced its intention to rule, but before entry of any ruling. Clearly, the issue was raised in a timely matter under Alaskan procedural rules.

Moreover, Ipalook sought to strike portions of the Tanana Chiefs' motion for reconsideration citing the same argument advanced in the Opposition filed in this Court. Resp. App. 63. The trial Court did not approve Ipalook's motion.

Finally, it must be noted that the Alaska Supreme Court ruled on the merits of the issues raised in the petition before this Court. The Alaska Supreme Court did not deny Tanana Chiefs' arguments on timeliness or waiver grounds. The Court ruled on the merits. Given this record, it is remarkable that Ipalook now claims that the issue was not timely raised. Clearly, Tanana Chiefs raised the issue in a timely manner, and Ipalook's Brief in Opposition seeks to misrepresent the record.

2) The Petition Raises Issues of National Importance.

Ipalook's Brief in Opposition argues that the issues raised in the Petition fail to raise issues of national importance. However, Ipalook notes that at least one other state – Montana – has a state overtime statute that has been interpreted to mandate punitive damages in the absence of employer's reprehensible conduct as in Alaska. *Rosebud County v. Roan*, 627 P.2d 1222, 1228 (Montana 1981).[1]

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[1] The other cases cited by Ipalook do not deal with overtime claims under state statue, and can be generally distinguished in that the cases contain evidence of

While Montana has not specifically ruled on whether liquidated damages under its statute are punitive, the indications are strong that Montana has a similar statute to Alaska. In Montana an employee may collect both "liquidated" damages and pre-judgement interest. *Id.* This would strongly suggest that the damages are punitive and not truly "liquidated".[2]

While it appears that no other State has adopted a similar interpretation of state law, at least five other States have overtime statutes that could be interpreted to mandate "liquidated" damages without regard to employer's reprehensible conduct.[3] It is unclear whether those States will follow the Alaska and Montana precedence. However, guidance from this Court would be helpful to those five States in construing their statutes in a constitutional manner, or considering the constitutional issues raised by their statutes. Thus, while not affecting a majority of States, the issues raised in this appeal affect at

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reprehensible conduct by the defendant. As noted in the Petition, many statutes in the country provide for mandatory punitive damages for conduct that is reprehensible *per se*. *See* Petition, at 12-13.

[2] Pre-judgement interest is not available where the statute provides for liquidated damages because liquidated damages are intended to compensate the worker for monetary injuries that are difficult to prove, such as lost interest. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 687, 745, 89 L.Ed. 1297, 1313, 65 S.Ct. 895 (1942). Where pre-judgement interest is available in addition to "liquidated" damages, the latter are considered to be punitive. *Bobich v. Stewart*, 843 P.2d 1232, 1236-1237 (Alaska 1992).

[3] These include Maine [26 MRSA Sec. 664 & 670]; Missouri [MRS 290.527]; Michigan [MCL 408.393]; New Mexico [NMSA 50-4-26]; and South Carolina [SCS 41-10-80].

least seven states, and any State which might consider similar legislation in the future.

Moreover, as both Tanana Chiefs and Ipalook note, the issue often arises in contexts other than overtime wage claims, such as landlord-tenant, consumer protection and similar legislation. Thus, while only seven state's overtime wage statutes are directly affected, the issue touches many states and presents an issue of national importance.

3) The Alaska Supreme Court's Reliance On *Overnight Motor Transp. Co. v. Missel* May Be Grounds For Summary Remand For Consideration In Light of *BMW v. Gore*.

The Opposition Brief correctly notes that the Alaska Supreme Court solely relied on *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682 (1942). Implicit in that reliance, however, is the Alaska Court's failure to acknowledge differences between liquidated (non-punitive) damages under the FSLA considered in *Missel* and the punitive nature of such damages under Alaska law. More importantly, however, is the silence of the Alaska Court with respect to *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct 1569, 134 L.Ed.2d 809 (1996). Despite briefing on the matter, the Alaska Court simply did not discuss whether *BMW of North America* was or was not applicable to awards under the Alaska statute.

In *Portec, Inc. v. The Post Office*, 499 U.S. 915, 113 L.Ed.2d 235, 111 S.Ct. 1299 (1991)[4] this Court granted a writ of certiorari, vacated and remanded to the Tenth Circuit for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L.Ed2d 1, 111 S.Ct. 1032 (1991). The Tenth Circuit had not considered the *Haslip* case in reaching its decision.[5] A similar result may be appropriate here, where the Alaska Supreme Court simply failed to address the considerations articulated by this Court in *BMW of North America v. Gore*, 516 U.S. 559, 116 S.Ct. 1569, 134 L.Ed.2d 809 (1996).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[4] The case below is reported at *The Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir., 1990).

[5] Unlike this case, the Tenth Circuit in *The Post Office v. Portec, supra*, decided the matter prior to the issuance of it decision in *Haslip*.